

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Breach Notification Matter 2013-1368-AP-702, and
Privacy Concern Matter 2013-1370-AP-704

August 19, 2013

INTRODUCTION and BACKGROUND

1. The present Report of Findings is made pursuant to subsection 60(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c. R-10.6 (“the Act”).
2. On May 9, 2013, the Department of Education and Early Childhood Development (“the Department”) reported a privacy breach to the Commissioner, asking that the Commissioner investigate the matter.
3. Subsequently, the family of the student at the heart of the privacy breach matter filed a privacy concern with our Office on May 13, 2013 involving the Minister, the Minister’s Office, and the Department. The family stated that the student’s personal information was shared between the Department and the Minister’s Office without the family’s consent and that the student’s personal information was read aloud to unknown recipients, including a fellow student who overheard and shared the information with the student in question. The family also indicated that they had additional concerns about how much of the student’s personal information was shared, why and with whom.
4. This matter stems from the handling of personal information of a student in relation to a specific graduation requirement in the Anglophone Sector of the New Brunswick public school system, namely a test known as the English Language Proficiency Assessment (“the Assessment”). The Anglophone Sector has different graduation requirements than the Francophone Sector, and requires students to successfully complete the Assessment. The Assessment is usually written in Grade 9, and where students do not pass the Assessment at this point, they are given the opportunity to rewrite in Grade 11 and again in Grade 12, if necessary.
5. The family arrived in New Brunswick after having lived outside of Canada for some time, and the student began Grade 12 in September 2012. Based on the fact that they had moved from an English-speaking country where the student had been enrolled in the public school system, the family questioned whether it was necessary for the student to write the Assessment. The family felt that the student’s academic record demonstrated a high level of proficiency in English and did not want the student to undergo the additional stress of writing the Assessment during the graduation year if it was not absolutely necessary.
6. The family felt strongly about this issue and asked for assistance from various sources, and in doing so, discussed their situation at various times with the school, the Department, the Minister, Members of the Official Opposition, and the media. The details of this matter were widely reported in the media at the time.

7. Students normally write the Assessment during the January examination period, but for a number of reasons that will be discussed in greater detail below, the student in this case wrote the Assessment in April 2013.
8. The Department followed its established practice for scoring the student's Assessment and reporting the student's Assessment results through the appropriate channels.
9. More than one privacy breach arose when some information about the student's Assessment was accessed and shared outside of the established practice and with individuals who were not authorized to know this information. On May 1, 2013, a Department staff member noted the student's Assessment results and sent an email to senior staff at the Department containing the student's name, the fact that the student had passed the Assessment, and the student's results. It was highly unusual that a student's individual Assessment results would be shared with senior staff.
10. Further, a senior official with the Department forwarded this email on to the Minister's Executive Assistant, who read the email aloud at home and was overheard by a family member in another room. The family member knew the student, as they were friends at school, and sent a text message to congratulate the student on passing the Assessment. The student and the student's family had not yet been notified of the results through the established protocol with the school.
11. This Report will address the circumstances that lead to these occurrences, including how the Assessment is normally administered by the Department, what happened to cause the privacy breaches and the reasons why they took place in this case. The Report will also provide recommendations to conclude our work in this matter.

COMMISSIONER'S INVESTIGATION

12. The Commissioner serves as an independent oversight body for public bodies in relation to their obligations under the *Act*, including the protection of privacy. As such, the Commissioner's Office can receive breach notifications from public bodies as well as concerns surrounding privacy from members of the public in regards to the handling of their personal information by public bodies.
13. The Commissioner's role in relation to all privacy matters is to conduct an independent and impartial investigation to determine whether the public body involved appropriately handled personal information in accordance with its obligations and the rules set out in Part 3 of the *Act*.

14. In this case, our Office investigated the self-reported breach and the family's privacy concern together, allowing us to gather all of the relevant facts and information in relation to both at the same time. As with all investigations into privacy matters, our primary objective was to uncover all of the relevant facts and details to understand the context in which the situation arose, to determine what happened and the events that led up to and including the breach, the causes of the breach, and the steps taken by those involved once the breach became known.
15. We interviewed several officials from the Department, as well as the Minister's Executive Assistant, the Minister himself, and family members of those involved in the matter. We note that this case was in the public eye throughout our investigation as the facts, ongoing issues, and updates were constantly being reported in the media and discussed in the public proceedings of the Legislative Assembly. Despite this public pressure and heightened sensitivity in participating in an investigation under these circumstances, we received good cooperation from all, and we were pleased with the level of openness and candour shown by those involved in our investigation.
16. We also extensively reviewed the *Education Act*, the applicable Departmental policies and procedures, and documentation provided on the specific graduation requirements in the New Brunswick public school system, including the Assessment. We also examined other documentation provided by those who were interviewed as part of our investigation.
17. The Commissioner's investigations are confidential. We informed all those that we interviewed to remain mindful of this fact, despite the ongoing public and media interest in the case throughout the course of our investigation. Now that we have concluded our investigation, we are able to publicly report our findings.
18. It must be understood that the Commissioner's investigation is to uncover the truth of what happened, to focus on facts in order to arrive at findings and to identify any errors that were committed when handling personal information with a view to correct them so that they are not repeated in the future. In short, we are looking to engage public bodies in achieving compliance with the law rather than assign blame.

Facts Uncovered

19. This case centered in large part on the family's concern about the student having to write the Assessment as a graduation requirement. It is essential that for the purposes of this Report that we explain in a certain level of detail the Department's administration of the

Assessment and how it applied to the student in this case, given that this is the context in which the breach arose.

English Language Proficiency Assessment

20. Graduation requirements for students in the New Brunswick public school system are set by the Minister of the Department through policy established under the authority of the *Education Act*.
21. Policy 316, “Graduation Requirements,” applies to all students in the New Brunswick public school system, and graduation requirements differ between the Anglophone and francophone sectors.¹ The requirements for students enrolled in the Anglophone sector are established under Appendix A, entitled “*Graduation Requirements for a High School Diploma*” and include the following:

In the 20-credit system, students must

...

- acquire a literacy credential by achieving a successful rating on the reading and writing components of the English Language Proficiency Assessment in grade 9. A reassessment in grades 10, 11, and 12 is available to students who have not achieved a successful rating on the reading and/or writing components; a potential graduate reassessment in June of grade 12 is a final opportunity to achieve the literacy credential for graduation requirements...

In the 16-credit system, students must

...

- acquire a literacy credential by achieving a successful rating on the English Language Proficiency Assessment, or Reassessment in grade 10, 11 or 12...

Graduation requirements for a student identified as being exceptional (as defined by the Education Act) may vary as documented in his/her Special Education Plan (SEP). Accommodation (ACC), modification (MOD), and/or individualization (IND) must be indicated on the transcript.

22. Therefore, in order to graduate in the Anglophone sector of the New Brunswick public school system, students are required to demonstrate their English language proficiency by successfully completing both the reading and writing components of the Assessment.

¹ This Policy is available online on the Department’s website at: <http://www.gnb.ca/0000/pol/e/316A.pdf>.

23. The general parameters of the Assessment are set out in the policy document entitled “2012-2013 Test Specifications: English Language Proficiency Assessment/English Language Proficiency Reassessment”² as follows:

Overview

The English Language Proficiency Assessment/Reassessment (ELPA/R) is an assessment of students’ literacy abilities based on the *Atlantic Canada English Language Arts Curriculum Outcomes (grade 8)* and the *New Brunswick Provincial Achievement Standards in Reading and Writing (grade 8)*. This aligns with the Organization for Economic Co-operation and Development (OECD) definition of functional literacy. Data obtained from the ELPA/R provide information about individual student achievement and provide a perspective on trends in school, district and provincial achievement in literacy.

ELPA

The English Language Proficiency Assessment (ELPA) is comprised of a Reading Comprehension Component and a Writing Component. It is written by all students in grade 9 and is a Graduation requirement unless an exemption is sought. Both components are scored separately and students must obtain a minimum score of Appropriate Achievement (AA) in both components in order to meet the requirement. The ELPA is administered during the January examination period.

ELPR

The English Language Proficiency Reassessment (ELPR), which is identical to the ELPA, is written by students in grades 11 or 12 who have previously scored Below Appropriate Achievement (BAA) in on or both components of the ELPA or ELPR unless an exemption is sought. Students rewrite only those components in which they have not obtained a score of AA. The ELPR is administered during the January examination period.

Cases in which students have previously obtained a literacy credential on a high school provincial literacy assessment from another province will be considered. The appropriate documentation must be forwarded to the Assessment and Evaluation Branch for approval. Literacy credentials from outside Canada will not be considered.

24. As set out above, the Assessment is usually written for the first time by students in Grade 9 during the January examination period. Department officials indicated that Grade 10 is

² This document is available on the Department’s website at: <http://www.gnb.ca/0000/publications/eval/ELPA-R-Test-Specifications-2012-2013.pdf>.

used as an intervention year for students who are not successful on either or both components of the Assessment and have the opportunity to rewrite the Assessment in Grade 11 and Grade 12, if necessary. Again, this is usually scheduled during the January examination period. Department officials indicated that the policy was structured in this way to allow ample opportunity for students to prepare for and meet this requirement.

25. Based on the information provided to us, the policy documents do not specifically address the Assessment process for students who transfer into the New Brunswick public school system after Grade 9.
26. This graduation requirement applies to all students enrolled in the Anglophone Sector, unless the student qualifies for an exemption or a waiver, which are only granted by the Department in certain circumstances.

Exemption from writing the Assessment

27. The policy documents show that certain students may be approved for an exemption from writing the Assessment, meaning that a student may be excused from writing the Assessment either on a temporary or permanent basis.
28. In order to qualify for an exemption, a student must be following a Special Education Plan as provided in the Notes to Appendix A mentioned above:

Schools may apply to have a student exempted from the Literacy Credential if the student is following a modified or individualized Special Education Plan in the English language arts area.

Schools should indicate the required accommodations on the reading or writing components for students whose SEP is for accommodations only; these students are expected to participate in the assessment.

29. This means that only certain students who are following a Special Education Plan will be approved for a permanent exemption from writing the Assessment. There are no other circumstances under which the Department has the authority to authorize a permanent exemption.

Waiver of the Assessment

30. The purpose of a waiver of the Assessment is quite different from that of an exemption. While an exemption is reflective of whether it would be appropriate for a student to write the Assessment, the granting of a waiver signifies that the student has already successfully obtained a similar literacy credential from another Canadian jurisdiction.

31. To qualify for a waiver, meaning that the Department waives the writing of the Assessment as a graduation requirement, a student must provide documentation that shows that the student has successfully passed a similar literacy credential in Canada. The terms in which a waiver is available is found in the policy document, “English Language Proficiency Assessment/Reassessment: Final Policy Document”³:

WAIVING OF ELPA/R

If students have documentation from another province of successful completion of a high school literacy credential—these will be accepted.

This policy applies only to other provinces in Canada. Outside of Canada will not be accepted and the students must write the ELPA/R.

32. The Department informed us that it has reviewed similar literacy assessments implemented in other Canadian jurisdictions and deemed some of these to be sufficiently comparable to the literacy standards set by the New Brunswick Assessment.
33. The Department indicated that it made the decision to only accept comparable credentials from within Canada, given that the comparative review is a detailed and involved process that would require an in-depth consideration of the different curriculum and assessment methods in other jurisdictions. As a result, the Department decided as a matter of policy not to consider any literacy credentials from outside of Canada, meaning that students who enter the public school system from outside Canada will have to successfully complete the Assessment to qualify for graduation, unless they fall within the parameters of an exemption as described above.

Administration of the Assessment and Reporting of Results

34. The Department has established standardized practices for administering the Assessment, including the distribution and writing of the Assessment, the scoring process, and the compilation and communication of student results.
35. To begin the process, the Department first distributes the testing materials to the schools with students who need to write or rewrite the Assessment.
36. The Assessment booklets that are distributed to students during the testing process are individually labeled for each student with the student’s name, grade level, name of his or her school, and an assigned identification number with a corresponding bar code that

³ This document is available online on the Department’s website at:
<http://www.gnb.ca/0000/publications/eval/ELPA-RPolicyDocument.pdf>.

allow the Department to track a student's Assessment without having to use any more personal information than necessary.

37. School officials administer the Assessment on-site for their respective students. Each school then gathers all of the completed Assessments and sends them directly to the Department.
38. The Department stores the completed Assessments in a secure location and employs confidential services to individually score the tests at a designated secure site. The Assessments are returned to the Department after they have been scored.
39. Once it receives the scores for both the reading and writing components of the Assessment, the Department then inputs this information for each student in Grade 9 who has completed the Assessment, as well as for students in Grades 11 and 12 who were required to rewrite the Assessment, into its internal statistical database. If the Department finds any inconsistencies or incomplete portions of the Assessment, it is able to track these issues using the assigned identifier.
40. Assessment results are reported as follows:
 - The Department sends individual results to the Superintendent and Director of Education for each district.
 - The Department sends individual results to each school principal, which are organized by grade and teacher.
 - The school principal shares individual results with each student's teachers, and provides the student and parents and/or guardians with a report of the student's performance on the Assessment.
 - The student and his/her parent(s)/guardian(s) will receive a personalized and confidential report of performance. A label will also be placed in the student's cumulative school record with a notation indicating a successful or unsuccessful achievement on the English Language Proficiency Assessment.
41. The Department also uses the compiled score data as it has an interest in identifying and tracking general trends and overall success rates, but does not otherwise use or track individual results.

In the present case

42. In this case, the student's family arrived in New Brunswick after having lived outside of Canada for some time. The student was enrolled in Grade 12 for the 2012/2013 school year. At the beginning of the school year, the student was informed that the Assessment was a graduation requirement and that the student would have to successfully complete it to be eligible to graduate in June 2013.
43. The family had concerns about this testing requirement and questioned whether it was necessary, given the student's previous academic record in the public school system in an English-speaking country outside of Canada.
44. The family contacted the Department in September 2012 with questions about the Assessment requirement with a view to determine whether an exception could be made for the student under these circumstances.
45. Staff of the Department informed the family that successful completion of the Assessment was a graduation requirement for all students in the Anglophone sector of the New Brunswick public school system as established by ministerial policy (Policy 316— Graduation Requirements).
46. The family inquired whether it would be possible for the student to obtain a waiver, as they had heard that this may be a possibility. Department staff explained that the waiver process was only available for students who transferred to New Brunswick from another Canadian jurisdiction and could demonstrate that the student had successfully completed a similar literacy credential. The policy was based on the Department's previous work to review and approve English language literacy assessments from other Canadian jurisdictions as comparable to the standards set by the Assessment.
47. Where the family had moved to New Brunswick from outside of Canada, it was not possible for the student to obtain a waiver. As this was the case, the student would be scheduled to write the Assessment during the January examination period.
48. The family understood that the criteria was set by Departmental policy and indicated to Department staff that they intended to raise the issue further as they did not agree with the policy.
49. Shortly thereafter, the family discussed their concerns with a Member of the Official Opposition of the Legislative Assembly (the "MLA"), who in turn suggested that the family bring its concerns to the Minister's attention to determine if the Minister could be of assistance.

50. The family consented to having the MLA contact the Minister on its behalf in relation to these concerns. In October 2012, the Minister agreed to meet with the family to discuss these concerns at the Minister's constituency office in Oromocto. The meeting was set up by the Minister's constituency assistant but the Minister met the family on his own.
51. The Minister recognized that he was acting in both his capacity as Minister of the Department and as a Member of the Legislative Assembly.
52. During the meeting, the family explained its concerns and provided the Minister with copies of the student's English language assessment results from the other jurisdiction from which the family had moved. The family believed that those results would support the fact that the student had demonstrated a high level of English language proficiency and thus should not have to write the Assessment. The Minister was sympathetic to the family's concerns and wanted to look into the matter further; therefore, the Minister accepted the documentation and undertook to look into whether the Policy allowed for any discretion to waive or exempt the student from the Assessment requirement.
53. The Minister followed up with the Department about the Policy and the exemption and waiver requirements; both the Department and the Minister agreed that the Policy was unambiguous and that the Minister had no discretion to intervene or excuse the requirement on a case-by-case basis. The Minister informed the family accordingly at the end of October 2012, and indicated that Department staff had assured him that accommodations would be made for the student in writing the Assessment so as not interfere with other exams and not to write with Grade 9 students. From our investigation, the family believed that this meant that the student would write the Assessment outside the January examination period.
54. At the conclusion of these conversations, the family, the Department, and the Minister were in agreement that the student had to write the Assessment and that the accommodations requested by the family would be put in place.
55. In early January 2013, one of the student's teachers informed the student that the writing time for the Assessment would be taking place during the January examination period. The family was upset by this news and again wrote to the Minister, expressing frustration about the fact that the student would have to write the Assessment, and that the Assessment had been scheduled during the student's exam period. The family believed this was contrary to the accommodations the Minister and the Department had agreed to provide.
56. The Minister tasked his constituency assistant to follow up on what appeared to be a miscommunication in the accommodations. The constituency assistant reported back to

the family that the student was not scheduled to write the Assessment with the Grade 9 students, but with the Grade 11 and 12 students who would be rewriting the Assessment. The constituency assistant also indicated that the school principal would be happy to speak with the family at any time.

57. The family was not satisfied with this response and informed the Minister's constituency assistant of the family's decision that the student would not be writing the Assessment.
58. The constituency assistant passed this information along to senior staff at the Department and asked that Department staff contact the school to sort out the situation with the family.
59. As it turned out, the student did not write the Assessment on the scheduled date during the January examination period.
60. Meanwhile, the family spoke to another Member of the Official Opposition regarding this whole matter, the then critic for the Education portfolio. After those discussions, the family consented for the Member to follow up with the Minister on its behalf about the case. The family also turned to the media to go public with these concerns.
61. At this point, Department staff became concerned that the family's refusal to have the student write the Assessment would jeopardize the student's eligibility to graduate in June.
62. Department staff decided to contact the family shortly after the time the student was to write the Assessment to discuss possible solutions for this situation.
63. The Department offered the family two options: a new time for the student to write the Assessment in February or an exemption based on the family's refusal to have the student write the Assessment. The Department offered the exemption as there was a precedent to do so based on the family's refusal to have the student write the Assessment, rather than on the exemption criteria as set out in the policy documents, which, as explained above, would only be available for students on a Special Education Plan. The family opted for the exemption.
64. The Department has the authority to authorize exemptions in accordance with the criteria set out in the policy documents, and the Minister would not be involved in this process.
65. Before the Department was able to prepare the paperwork to send to the family for the exemption, the Minister learned of this development as a result of a media inquiry about the student's situation. The Minister questioned Department staff about how an

exemption could be offered to the family when it was his understanding the Policy was clear that the student was ineligible.

66. As a result of the Minister's inquiries, Department staff looked into the matter further and sought advice about whether the exemption offer based on the family's refusal was in keeping with the established policy. It was determined that the Policy did not allow for an exemption or a waiver in the circumstances presented in this case. In fact, when Department staff looked further into the matter, they discovered that the previous exemption that had been granted based on the family's refusal to write was under a different set of circumstances and the assessment in that case was not a graduation requirement.
67. Consequently, in March 2013, Department staff contacted the family to explain the situation and to determine the next steps in order to ensure that the student would graduate in June 2013.
68. The family was quite frustrated at this point, but understood that the Policy remained in effect and that the student would indeed have to write the Assessment in order to graduate.
69. The family shared its concerns once again with the Education Critic for the Official Opposition and with the media.
70. During this time, the Department and the school continued to work with the family to ensure that appropriate accommodations were in place and the student finally wrote the Assessment in April 2013.
71. Given the public profile of the case, senior Department staff informed the Minister and his Executive Assistant (formerly the Minister's constituency assistant, who moved to this new position in February 2013) that they had worked with the school and the family in making appropriate accommodations for the student to write the Assessment, that the family was pleased with this outcome, and that the student was scheduled to write the Assessment the following week.
72. On the first day of the scheduled writing time, the school informed a senior staff member with the Department that the student began writing the Assessment. The senior staff member informed three other people of this fact by email: another senior staff member, the Minister, and the Executive Assistant.

73. In late April 2013, the student's completed Assessment materials were scored according to the Department's established practice, along with the other students in Grade 11 and Grade 12 who rewrote the Assessment.
74. The staff member prepared the results for the schools as per the established practice.
75. In compiling the students' results to be issued to the appropriate schools, a staff member of the Department authorized to have access to this information specifically noted that the student had completed the Assessment and was successful as per the scores the student received on each component. This occurred on May 1, 2013, and that same day the staff member also sent an email to senior Department staff advising that the scores were finalized and that the student was successful on both components. In that email, the staff member indicated the scores the student had received on each component. A senior Department official forwarded this email on to the Minister's Executive Assistant.
76. The Minister's Executive Assistant checked his work emails from home that evening and read aloud the email containing the student's information. The Executive Assistant was not aware that a family member was nearby and overheard the information. The family member knew the student because they were friends at school and immediately sent a congratulatory text message to the student.
77. The student responded, asking the family member how this was possible as the student had not yet been informed of the results. The family member had "heard [the Executive Assistant] reading an email about it," and told the student to "keep this to yourself..."
78. Later that evening, the student shared the text message exchange with the family, which alerted them to the fact that the student's test results had been shared with the Minister's Office before the family learned of them through the usual reporting process.
79. On May 6, 2013, the family discussed this situation with the MLA who had assisted the family at the beginning of this case and the family provided copies of the text message exchange between the student and the Executive Assistant's family member.
80. On May 7, 2013, the Official Opposition questioned the Minister during Question Period in the Legislative Assembly (which is a public broadcast) about the disclosure of the student's test results from the Minister's Office, naming the student in the process. It does not appear that the Minister was aware of the situation at this point and the Executive Assistant was not aware of the family member's text message to the student in question.

81. During Question Period on May 8, 2013, the Official Opposition read the text message exchange between the Executive Assistant's family member and the student, at which point the Minister was able to understand what had taken place. Also on this day, the Executive Assistant learned of the events involving the family member, i.e., that the email had been overheard and a text sent to the student in question. The Executive Assistant immediately briefed the Minister about the events that had transpired.
82. On May 9, 2013, the Department notified our Office of the situation and asked us to investigate. On that same day, the Minister also acknowledged in the Legislative Assembly during Question Period that a breach of personal information had occurred at the Department and the Minister's Office and that the situation had been reported to the Commissioner. That same week, the family contacted the media to share details of this situation and to advise that they would be filing a complaint with our Office, which the family did on May 13, 2013.
83. Over the course of the next several weeks, Members of the Official Opposition asked the Minister during Question Period to provide further details about the privacy breach incident and this case continued to be widely reported in the media. The Minister refused to speak about the case or to divulge any personal information in relation to the family and the student to prevent any further breaches. We speak more on this later in this Report.

QUESTIONS RAISED IN THIS CASE

84. Having well established all of the pertinent facts in relation to this matter, we are able to provide answers to the essential questions it raises: What happened in this case, and why did it happen?

What happened in this case?

85. To answer this first question, i.e., what happened in this case, we first need to describe what constitutes "personal information" within the meaning of the *Act* and set out the rules under the *Act* about how personal information should be collected, used and shared in all instances by public bodies. We then apply this definition and these rules to the facts in order to determine whether the present circumstances amounted to a privacy breach.
86. If we find that a privacy breach did in fact take place, it is essential we delve further into the root causes of the breach, i.e., why did the breach happen in the first place. Only where we uncover the reasons why a breach occurred are we able to give recommendations that ought to prevent a similar breach from happening again.

Definition of “personal information”

87. To understand what “personal information” means, we look to the *Act*’s definition, which is broad and includes recorded information that identifies a specific person. The information concerns a person and the context within which it is found allows whoever knows the information to link it to a specific individual. In other words, it is possible to figure out to whom the information relates.
88. The definition provides specific examples of what is meant by “personal information” but the definition is not limited to those specifics. Examples of these specifics include name and contact information, age, gender, family status, ancestry, religious beliefs, associations, blood type, financial circumstances, criminal history, employment history, and health care information about the individual.
89. For the present purpose, however, we cite only those specifics that are applicable to this case:
- (a) the individual’s name
 - (...)
 - (i) information about the individual’s education...⁴
90. The personal information at the heart of this case included the student’s information as it concerned the student’s education, specifically, the name of the student, the school, the issue as to whether the student would write the Assessment (a graduation requirement), the fact that the student eventually wrote and successfully completed the Assessment, and the test results attributed to the student.
91. All this information belonged to and identified the student and therefore this case falls squarely within the ambit of the *Act* as it relates to the student’s personal information and its handling by public bodies, i.e., the Department and the Minister’s Office.

Rules that protect personal information

92. It is under Part 3 of the *Act*, entitled “Protection of Privacy,” that we find all the rules that govern the handling of personal information by public bodies, including its collection, use and disclosure.

⁴ See section 1.

93. The main rule that we refer to as the guiding principle restricts the handling of personal information to the minimum necessary:

Collect, use or disclose only the minimum amount of personal information reasonably necessary to accomplish the purpose for which the information is first solicited.⁵

94. This concept is fairly simple in its description, but not always easy to apply.
95. The guiding rule obligates employees of a public body to collect and use only the personal information that they need to carry out their work. For example, to obtain a public library card, an individual needs to provide proof of identification such as a driver's license which library staff are required to collect in order to verify the individual's identity and contact information; however, staff do not need and must not collect additional personal information such as proof of income simply to carry out the task of providing the library card. This illustrates the connection between personal information and how much of it is needed in order to carry out a task.
96. At collection, the public body must inform the individual why his or her personal information is being collected. This discussion allows both the public body and the individual to know exactly how much personal information is required, how it will be used, and equally important, with whom it can be shared (i.e., its collection, use and disclosure). This falls in well with the limits that are placed on the use and sharing of personal information to only those who need it to perform their tasks; tasks for which the information was first collected. This is often referred to as the "need to know" rule.⁶
97. These rules are in a nutshell those within which all public bodies must operate whenever handling personal information. The rules also establish how and when personal information can be lawfully shared by recognizing that public bodies need to share or disclose personal information in order to administer programs and provide services to citizens essential to good governance.
98. Having established what constitutes the student's personal information at the centre of this case and the rules governing its handling, the question now becomes did either the Department or the Minister's Office commit a breach of privacy?

⁵ See subsections 37(2) and 43(2).

⁶ See subsection 43(3).

Was there a privacy breach in this case?

99. The evidence we uncovered demonstrated that there was more than one incident of privacy breach involving the student's personal information in this case.
100. We found that both the Department and the Minister's Office caused privacy breaches but only in relation to disclosure of personal information, not in relation to its collection or use. We address each of these points in turn.

Collection and Use by the Department

101. The facts of this case show that the Department was authorized to collect and use the student's personal information so that the student could write the Assessment. This finding is based on the Department's lawful authority to collect and use personal information to carry out a task under the *Education Act*, specifically, to administer the Assessment for public high school students in the Anglophone sector.
102. In various telephone conversations, meetings and email messages between the Department's staff and the family, the Department collected and used the student's personal information and only the amount necessary to:
 - a) first determine whether the student would be required to write the Assessment given the fact that the family moved to New Brunswick from outside Canada;
 - b) set up a time and place for the student to write the Assessment and to ensure that appropriate accommodations were made for the student; and,
 - c) score the Assessment to arrive at test results for the student.

103. Having reviewed the Department's practices and procedures in relation to these matters, we find that the Department appropriately handled the student's personal information for the purpose of administering the Assessment.

Collection and Use by the Minister's Office

104. The facts of this case are equally clear that the Minister's Office was authorized to collect and use the student's personal information so that a determination be made in relation to whether the student was required to write the Assessment, or that the student be granted an exemption or waiver. This finding is based on the fact that the family sought the assistance of the Minister's Office in this regard and provided consent accordingly.

105. In the meeting held with the family and email messages exchanged, the Minister's Office collected and used the student's personal information only to determine whether the student qualified for an exemption under the Policy 316 not to write the Assessment given the fact that the family moved to New Brunswick from another English-speaking foreign jurisdiction, and failing that, to provide accommodations for the student in the circumstances so as not to write at the same time as the Grade 12 exams.
106. Having reviewed the actions of the Minister's Office in relation to the family's request for help, we find that the Minister's Office appropriately handled the student's personal information for this purpose.

Disclosure by the Minister's Office – Part 1

107. As the family sought help directly from the Minister, the information collected was shared with two senior staff members of the Department in order for them to advise the Minister on how best to provide an answer to the family's request.
108. We found no evidence of wrongdoing when the Minister's Office communicated the student's personal information to these two senior staff members in order to seek their assistance in finding answers to the family's concerns. This would be the normal course of action and is standard practice across Provincial government departments. Furthermore, the Minister's Office had the family's consent to use and disclose the information in this manner.
109. For our present purposes, it must be noted that these two senior staff members were the same officials to whom the student's personal information was later communicated by Department staff after the student wrote the Assessment in April 2013. This fact becomes important as we describe further in this Report why the privacy breaches occurred in this case.
110. Notwithstanding, in the context of the family's concern for the student having to write the Assessment in order to graduate, in seeking the Minister's direct assistance, the family gave his Office consent and therefore the authority to act on that concern and share the request with senior staff. This included the need to share the student's personal information with staff in order to conduct the appropriate follow-up and report back directly to the family.

Disclosures by the Department

111. For the most part, the facts showed that the Department disclosed the student's personal information again in accordance with its usual confidential and proper practice for administering the Assessment.
112. Also, the Department lawfully disclosed the fact that the student had written and successfully completed both components of the Assessment and test results attributed to the student when the Department processed and issued this information to the appropriate officials, namely when the Department communicated this information to the Superintendent of the District and to the Principal of the high school where the student attended.
113. On the other hand, the facts also demonstrate that the Department deviated from its usual practice when it handled the student's personal information. In the context of all the circumstances surrounding the family's requests for assistance not only to the Department, but also the Minister, the media and other politicians, which the family was more than entitled to do, the Department handled the student's personal information differently than it normally did as this was an unusual case.
114. A Department staff member reviewed the list of test results on which the student's results were also listed, a task that the staff member was authorized to do, but with a view to determine two important points relevant to this case:
 - whether the student had in fact written the Assessment; and,
 - whether the student had passed it.
115. The staff member wanted to know these particular facts in order to properly advise the two senior staff members given the concerns expressed by the family directly to the Minister in October of 2012. In other words, the staff member wanted to report back to senior staff that the student had written the test and passed so that there was no lingering issue in relation to this graduation requirement for the student in question.
116. The high profile of this particular case was such that to advise these senior staff members of the student having written and passed the Assessment was done not with a view to breach the student's privacy but for the single purpose of advising of the fact that the family's concerns surrounding the Assessment had been resolved.
117. This is why the staff member shared that information with two other senior staff members who would not normally be privy to this information. The student's information was handled in a different fashion due to all of the circumstances

surrounding this case and the need to keep senior staff abreast of the developments given the public nature to this case.

118. The staff member sent an email to two members of the Department's senior staff advising that the scores were finalized and that the student was successful on both components. The email also went further to include the student's scores for each component of the Assessment.
119. We find that informing senior staff that the student had written the Assessment and had passed it was an appropriate disclosure of the student's personal information given all of the circumstances of this case. In our view, it was the act of communicating the test results that constituted an inappropriate disclosure of the student's personal information in this matter. The test results had nothing to do with informing senior staff that the family's situation had been resolved, i.e., the email disclosed more than the minimum amount of information necessary to carry out that task. The disclosure of the student's test results to senior staff members constituted a breach of privacy.
120. Then, we found that another privacy breach took place. One of the senior staff members who received the email containing the student's information described above in turn forwarded the same email to the Minister's Executive Assistant for the same purpose, to inform the Minister that the situation had been resolved. The facts are clear that the Minister did not receive this email.
121. For the same reasons as indicated above, we find that the facts of this case were such that it was appropriate to inform the Minister's Office that the family's concerns surrounding the student having to write the Assessment were fully resolved. Where we find there was a breach was in the Department's senior staff having sent the same email that contained the student's test results to the Executive Assistant. Senior staff ought not to have shared the test results as the Executive Assistant was not a person lawfully authorized under the *Act* to know this personal information only to inform the Minister's Office that the student had written and successfully passed the Assessment.
122. Again, the test results had nothing to do with informing the Minister's Office that the family's situation had been resolved. The first email that caused a breach contained too much personal information and the second breach was caused when it was forwarded to the Executive Assistant. The email to the Executive Assistant disclosed more than the minimum amount of information necessary to carry out the task of simply informing the Minister's Office.

Disclosure by the Minister's Office – Part 2

123. As indicated above, the Minister's Executive Assistant was the recipient of the Department's email in which the student's test results were wrongfully disclosed.
124. The Executive Assistant acted inappropriately in relation to the email and in doing so committed yet another privacy breach.
125. The imprudent actions of the Minister's Executive Assistant consisted of first reading the email aloud and secondly, doing so while at home unaware there was another family member present within hearing distance. This amounted to a lack of proper care and attention when reading work-related emails, especially outside of confines of a more secure workplace, and amounted to an improper handling of the student's personal information.
126. Regrettably, and as was widely reported in the news, the family member who overheard the Executive Assistant sent a congratulatory text message to the student who had not yet received the results through the usual channels. Finding out of the student's test scores in this manner understandably caused the family significant grief and concern.

Why did it happen?

127. Our investigation revealed that the reasons why this information was shared in this manner were based on an overarching concern to see a successful outcome for the student involved, or in other words, that the requirement of writing the Assessment not become an obstacle to the student graduating from high school.
128. Everyone at the Minister's Office and Department that we interviewed stated that they were genuine in attempting to find a solution to the family's concerns and a solution that remained respectful of Policy 316 and the student's best interests. The aim was to ensure the student be given every opportunity to meet this graduation requirement.
129. In addition, Department staff was preoccupied with what was by all accounts an unusual case surrounding the administration of the Assessment. The Department had the best intentions in the face of constant media attention and political pressure to find a solution to the family's concerns.
130. It is in this context that the Department staff believed senior staff as well as the Minister's Office needed to know this information. While all involved acknowledged that it was highly unusual to share a particular student's situation in this manner, the purpose for communicating this information was to let senior staff and the Minister's Office know

that the situation had a positive and successful outcome. It is for all these reasons that the Department's improper disclosures took place.

131. We appreciate the reasons why and accept that Department staff made the decision to share the outcome of the situation with senior staff and the Minister's Office. We find, however, that despite these valid reasons, communicating too much personal information (the student's test results) was contrary to the *Act*. The Department was not permitted to deviate from its established protocols in relation to communicating the student's test results. We find that doing so was the root cause of the privacy breaches which took place.
132. As for the Minister's Office, the Executive Assistant who was also present when the family first asked to seek the Minister's help was equally relieved to see the matter come to a satisfactory resolution. The email in question was a positive resolution to a situation that had persisted for seven months. The Executive Assistant was pleased with this outcome; perhaps that is why the Executive Assistant read aloud the email at home, forgetting for the moment that this was not wise.
133. As a final point, we express our own concerns about protocols for sharing personal information when a Minister, also a Member of the Legislative Assembly and representative of constituents, asks staff for advice or assistance in order to provide answers to concerns expressed directly to him.
134. We can appreciate that the lines were blurred in relation to certain aspects of this case—the Minister was acting in both his capacity as a Member of the Legislative Assembly and the head of the Department, the Minister's constituency assistant later became his Executive Assistant, plus the media and political involvement that raised the public profile of the situation. This led to some confusion about what personal information could be shared with whom and for what purposes.
135. While the Department deviated from its usual practice to communicate test results, we did not find any evidence of ill will or malicious intent on behalf of any of the officials involved in this case. To the contrary, the evidence demonstrates that everyone involved was primarily concerned with the student's best interests while perhaps becoming too involved in providing assistance in the process.

What steps have been taken to address the breach?

136. The Minister became aware of the situation on May 8, 2013 when the Executive Assistant informed him about what had happened. The Minister then appointed a senior official who was not involved with the case to look into the situation to determine what had occurred and the extent of the breach. The senior official confirmed to whom the email containing the student's test results had been sent. The student's personal information disclosed without authorization could not be retrieved in this case as it had already been shared with those who were not authorized to know it.
137. The Minister personally took steps to prevent any further breaches of the student's personal information once he learned of the situation. The Minister faced many questions from other Members of the Legislative Assembly over the following weeks asking for more details about the situation, but the Minister consistently and rightly in our view refused to publicly discuss any details of the family's case.

Corrective measures to date

138. The Department and the Minister's Office are now more aware of the importance of maintaining solid privacy practices even in unusual or difficult circumstances. Upon learning of the breach in this case, both the Department and the Minister recognized the need to improve their internal policies and procedures.
139. The Department has confirmed that it has made arrangements for staff to receive comprehensive training on the privacy obligations and requirements under the *Act* to reduce the risk of future privacy breaches. The Department has also indicated its interest in receiving the Commissioner's recommendations in that regard.

FINDINGS

140. In accordance with all of the above, we make the following findings.

Collection and Use by the Department – No breach

141. We find that the facts of this case show that the Department was lawfully authorized to collect and use the student's personal information based on its need to carry out a task under the *Education Act*, specifically, to administer the Assessment for public high school students in the Anglophone sector.
142. The facts demonstrate that the Department appropriately handled the student's personal information for the purpose of administering the Assessment.

Collection and Use by the Minister's Office – No breach

143. The facts of this case are equally clear that the Minister's Office was authorized to collect and use the student's personal information so that a determination be made in relation to whether the student was required to write the Assessment, or that the student be granted an exemption or waiver. This finding is based on the fact that the family sought the assistance of the Minister's Office in this regard and provided consent accordingly.
144. Having reviewed the actions of the Minister's Office in relation to the family's request for help, we find that the Minister's Office appropriately handled the student's personal information for this purpose.

Disclosure by the Minister's Office – Part 1 – No breach

145. As the family sought help directly from the Minister, the information collected was shared with two senior staff members of the Department in order for them to advise the Minister on how best to provide an answer to the family's request. We found no evidence of wrongdoing when the Minister's Office communicated the student's personal information to these two senior staff members in order to seek their assistance in finding answers to the family's concerns. This would be the normal course of action and is standard practice across Provincial government departments. Furthermore, the Minister's Office had the family's consent to use and disclose the information in this manner.

Disclosures by the Department – Two breaches of privacy

146. We find that informing senior staff that the student had written the Assessment and had passed it was an appropriate disclosure of the student's personal information given all of the circumstances of this case. In our view, however, it was the act of communicating the test results that constituted an inappropriate disclosure of the student's personal information in this matter. The test results had nothing to do with informing senior staff that the family's situation had been resolved, i.e., the email disclosed more than the minimum amount of information necessary to carry out that task. The disclosure of the student's test results to senior staff members constituted a breach of privacy.
147. It was also appropriate to inform the Minister's Office that the family's concerns surrounding the student having to write the Assessment was fully resolved but for the same reasons, the Department's senior staff committed a breach when sending the same email that contained the student's test results to the Executive Assistant, thereby sharing more personal information than was necessary. The test results had nothing to do with informing the Minister's Office that the family's situation had been resolved.

Disclosure by the Minister's Office – Part 2 – One breach of privacy

148. The Minister's Executive Assistant received the Department's email that contained too much personal information in the form of the student's test results. The Executive Assistant acted inappropriately in relation to the email by reading the email aloud and doing so while at home unaware there was another family member present. This amounted to an improper handling of the student's personal information and constituted a breach of privacy.

Family's privacy concerns filed with our Office

149. Accordingly, the family's privacy concern against the Department is founded, as the student's test results were viewed by a Department staff member, who then shared the student's personal information outside of the usual process for sharing student test results.
150. The family's privacy concern against the Minister's Office is founded, as the Minister's Executive Assistant should not have read the email containing the student's personal information aloud so as to disclose it to family member.
151. The family's privacy concern against the Minister is unfounded. While the Minister was informed of the student's test results as a result of the unauthorized disclosure, the Minister was not involved in the circumstances that lead to the breach. In addition, after the Minister publicly acknowledged that a privacy breach had occurred, the Minister took steps to ensure that he did not discuss the situation publicly so as to prevent any further breaches of the student's personal information.

CONCLUDING COMMENTS

152. This case has demonstrated how easy it is for staff members who are otherwise well-experienced in the protection of personal and confidential information to nevertheless deviate from their usual good practices when faced with unusual or extraordinary circumstances. While it may be believed that as long as personal information stays within the confines of an office it will not constitute a privacy breach, we know that this belief is based on a lack of awareness of privacy rules under the *Act*.
153. As we observed in this case, officials from the Department were not at liberty to share all of the student's personal information with other staff members without a legitimate purpose to do so.

154. The rule is simple: only use and disclose the minimum amount of personal information that is necessary to accomplish the task and only to share this information with those who need to know.
155. This rule becomes more crucial when using technology intended to improve our work lives by allowing an expedient transmission of the information to those with whom we work as it can also cause the user of the technology to quickly make a serious error when not taking the time to apply the rule correctly.
156. In this case, one email containing too much personal information was transmitted in succession to other users thereby causing multiple breaches of privacy as no one recognized that it contained too much information.
157. Undeniably, this was a very difficult situation for all involved. The family and the student at the heart of the matter for obvious reasons felt their privacy had been violated. The Executive Assistant who read email aloud and family members were also impacted and upset that grief had been caused to someone they knew. The fact that this case was so high profile with media and political involvement made it more difficult as actions were publicly scrutinized.
158. The Minister and Department staff were also troubled and felt genuinely sorry that the Department and his Office had breached the privacy of the student when there was no intent to do so or cause harm. The fact that the personal information unlawfully disclosed was positive, i.e., the test results indicating that the student was successful in passing the Assessment, did not in any way diminish the privacy breaches or harm caused by them.
159. The consequences of these actions have resulted in the family's lack of confidence in how Department and Minister's Office handles confidential student information, and perhaps, the public's.
160. We do add for the record that during the course of this investigation, the Minister issued a letter of apology to the family. While an apology could not correct the harm done, we believe it was a good faith effort to admit to the wrong committed and to start rebuilding the trust that the Minister and his Department lost as a result of these breaches.
161. The family was correct in bringing this privacy concern to our attention. Today, the Department will be asking itself the right questions about how to make improvements in its procedures in order to prevent future incidents as that we found took place in this case.

162. In conclusion, we take this opportunity to share three simple tips that everyone can use whenever having to communicate private or confidential information:

- THINK before you speak,
- CONSIDER before you write, and,
- PAUSE before you click.

163. It has been our experience to date that by adopting these simple measures, one can reduce the risk of inadvertently mishandling the information.

RECOMMENDATIONS

164. Given the findings above, the Commissioner makes the following recommendations under paragraph 60(1)(h) of the *Act*:

- That the Department review its internal practices;
- That the Department establish without delay a review of its internal procedures in relation to all the personal information that comes into its custody and control and that it uses and discloses in the performance of its functions and duties with a view to ensure that these procedures obligate staff to protect privacy at all times and in accordance with the rules regarding the collection, use and disclosure of personal information set out in Part 3 of the *Act*;
- That the Department report to the Office of the Commissioner in regards to its progress in this review no later than February 28, 2014;
- That the Minister's Office review its internal practices with a view to ensure that these practices allow its staff to protect personal information collected when a member of the public approaches the Office for assistance, with a view to ensure the use and disclosure of such personal information is done in accordance with the *Act*; and,
- That the Minister's Office report to the Office of the Commissioner in regards to its progress in this review no later than December 13, 2013.

165. The Commissioner also makes the following recommendations to the Department under paragraph 60(1)(h) of the *Act*:

- That the Department follow the established practice for reporting students' English Language Proficiency Assessment results in all cases and without exception to adequately protect the students' personal information.

Dated at Fredericton, New Brunswick, this _____ day of August, 2013.

Anne E. Bertrand, Q.C.
Commissioner